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PP

v.

NG SING TING & ANOR

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HIGH COURT MALAYA, JOHOR BAHRU
MOHD ZAWAWI SALLEH JC
[CRIMINAL TRIAL NO: MT(3) 45-74-2003]
27 NOVEMBER 2007

C ***CRIMINAL LAW:*** *Dangerous Drugs Act 1952 - Section 39B(1)(a) - Trafficking drugs - Allegation of - Whether proved - Whether there was discrepancy as to weight of drugs - Physical nexus between accused persons and drugs found - Whether arose - Whether element of possession proved against accused persons - Dangerous Drugs Act 1952, s. 37(da)*
D *- Failure to call material witnesses - Evidence Act 1950, s. 114(g) - Whether invoked - Whether there were contradictions in prosecution's evidence - Whether prima facie case made out against accused persons*

CRIMINAL LAW: *Prosecution - Close of prosecution - Prima facie case*
E *- Evidence - Whether there was discrepancy as to weight of drugs - Physical nexus between accused persons and drugs found - Whether arose - Whether element of possession proved against accused persons - Dangerous Drugs Act 1952, s. 37(da) - Failure to call material witnesses - Evidence Act 1950, s. 114(g) - Whether invoked - Whether there were*
F *contradictions in prosecution's evidence - Whether prima facie case made out against accused persons*

The accused persons herein were jointly charged with trafficking in 851.5 grams of monoacetylmorphines, an offence under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act') read
G together with s. 34 of the Penal Code and punishable under s. 39B(2) of the Act. Both of the accused persons claimed trial to the charge. The facts of the prosecution's case were that on 28 June 2002, acting on information received, a police party led by SP4 arrived at the Larkin Utama condominium at 9am. At
H 11.40am, SP4 received information from SP7 through his walkie talkie that two male Chinese, probable targets, were leaving the area in a Proton Wira and a Kelisa. SP4's group arrested the driver of the Proton Wira (the second accused) whilst SP6's men arrested the driver of the Kelisa (the first accused). Subsequently,
I SP4 brought the second accused to the Proton Wira JGN 9430 and directed SP6 to bring the first accused to JGN 9430. Using

the remote control which he recovered from the first accused, SP4 was able to unlock car JGN 9430 and a search was made, revealing one blue canvas bag ('Casorama') which contained substances suspected to be drugs and one blue canvas bag ('8199'), a transparent plastic bag with newspaper packages each wrapping a plastic packet containing substances suspected to be drugs. The exhibits together with both the first and second accused were then brought to the police station where SP4 marked the various exhibits seized and handed them over to SP9. The issue herein was to determine at the close of the prosecution's case as a trier of fact whether the prosecution had made out a *prima facie* case and that he must subject the prosecution evidence to maximum evaluation. The issues that arose were: (a) whether there were serious doubts as regards the identity of the drug exhibits; (b) that in respect of the first accused, the element of possession has not been proven against him; (c) that in respect of the second accused, he was not in exclusive possession of the drugs in JGN 9430 due to the Teo Yeow Seng and Chong Mei Fong factors and (d) the credibility of both SP4 and SP8.

Held (acquitting and discharging both the accused persons):

(1) There was a discrepancy as to the weight of the drugs. SP9 had said that the gross weights of the drugs were 10778 grams. However, in cross examination, SP9 had agreed that in the report lodged by SP4, the weight stated was 10580 grams. There was a discrepancy of 198 grams which was a substantial amount and represented 14 times the statutory limit for trafficking. There was no explanation as to how the discrepancy came about. It was clear that from the time the drug passed from the hands of the arresting officer (SP4) to SP9 the weight had increased by 198 grams to the detriment of the accused. On this score alone, it could not be said that a *prima facie* case had been proven. (para 6)

(2) There was no case against the first accused. The only evidence against him was a set of keys and remote control to JGN 9430 which was found in his pocket by SP6 and that he was together with the second accused at the boot of JGN 9430 as though looking to the left and right. JGN 9430 did not belong to the first accused. There was no evidence prior to his arrest the first accused had driven the car, ever opened any of the doors to JGN 9430 or put the drugs inside the

boot of JGN 9430. As confirmed by SP9, one Teo Yeow Seng had possession of one set of keys to JGN 9430 and a set of keys and the remote control were found in the Mercedes of Teo Yeow Seng. As such it could not be said that the first accused had possession of the JGN 9430 and consequently had possession of the drugs found in the boot to JGN 9430. (para 6)

(3) There was no physical nexus between the drugs in the boot of JGN 9430 and the first accused. He was merely near the boot and beside the second accused looking left and right. At the very most, his behaviour would raise suspicion but suspicion was insufficient to impute knowledge, let alone physical custody or control. We could not, under these circumstances, infer that the first accused had knowledge of the drugs in the boot of JGN 9430. His conduct was consistent with innocence. (para 6)

(4) Although the second accused was the registered owner of JGN 9430, it could not be said that the prosecution had proved the element of possession against him to trigger the trafficking presumption under s. 37(da) of the DDA 1952 because one Teo Yeow Seng was not a fictitious character. Teo Yeow Seng was charged together with both the accused for the same offence but the charge against Teo Yeow Seng was withdrawn after one year. SP9 could not deny that Teo Yeow Seng could have access to JGN 9430 since he also had possession of a set of keys and remote control. One Chong Mei Fong was also arrested and it was conceded that Chong Mei Fong was the girlfriend of the second accused and it could not be denied that Chong Mei Fong could have access to JGN 9430. (para 6)

(5) Both Teo Yeow Seng and Chong Mei Fong were material witnesses but neither were called by the prosecution nor were they offered to the defence for purpose of cross examination. That was fatal which carried the following consequences (i) there was a breach in the rule in *Ti Chuee Hiang v. PP*; (ii) there was a gap in the case of the prosecution, in that both Teo Yeow Seng and Chong Mei Fong have not been excluded from having access to JGN 9430 and (iii) that s. 114(g) of the Evidence Act 1950 could be invoked against the prosecution as there was no explanation why no attempts

at all were made to locate the both of them and (iv) the defence could not be penalized if the police failed to locate Teo Yeow Seng and Chong Mei Fong and as such the second accused must be given the full benefit of the doubt. (para 6)

(6) There were many contradictions in SP4's evidence. He was a very senior officer and holds the rank of ASP. There was no excuse if he had been involved in many cases. He was expected to be so. All police witnesses including SP4 would have given their 112 statements and there was nothing to prevent SP4 from refreshing his memory before trial. Therefore, the issue of 'ingatan saya terhad' could not arise. SP4 was therefore impeached. (para 7)

(7) SP8 had testified that by standing on the toilet bowl in the toilet he could see the second accused bent his boot of JGN 9430 and held a newspaper package in his hands moving from left to right. This part of the evidence could not inspire confidence or be accepted as true. It defied both logic and common sense that this important piece of evidence was kept in SP8's sleeves until he came to court. SP8 had not informed SP4 or SP7 about this. SP8 must report what he observed. Revealing it for the first time in court was suspicious and the court ought to treat his evidence on this aspect with caution. Further, there was no adequate investigation on this aspect to enable the court to rely on the evidence of SP8. There was no close up photographs together with proper drawings in the sketch plan to show where JGN 9430 was parked when SP8 made the observation to assist the court to come to a proper finding. SP8 also made no reference to the sketch plan to properly explain his position in relation to JGN 9430 bearing in mind JGN 9430 was parked at an angle. (para 7)

(8) The prosecution had not made out a *prima facie* case against both the accused persons. (para 8)

Case(s) referred to:

Balachandran v. PP [2005] 1 CLJ 85 FC ***(refd)***
Kesavan Petchayo v. PP [2003] 1 CLJ 846 CA ***(refd)***
Kong Chooi v. R [1955] MLJ 209 ***(refd)***
Looi Kow Chai & Anor v. PP [2003] 1 CLJ 734 CA ***(refd)***
Lee Chee Meng v. PP [1992] 1 CLJ 345; [1992] 1 CLJ (Rep) 168 SC ***(refd)***

A *Matthew Lim v. Game Warden, Pahang [1959] 1 LNS 57 HC* ***(refd)***
Pang Chee Meng v. PP [1992] 1 CLJ 39; [1992] 1 CLJ (Rep) 265 SC ***(refd)***
Pavone v. PP [1986] 1 MLJ 423 ***(refd)***
PP v. Lee Hock Lai [2004] 1 CLJ 57 HC ***(refd)***
B *PP v. Lin Lian Chen [1992] 4 CLJ 2086; [1992] 1 CLJ (Rep) 285 SC* ***(refd)***
PP v. Mohd Radzi Abu Bakar [2006] 1 CLJ 457 FC
PP v. Munusamy [1980] 1 LNS 63 FC
Shamsuddin Hassan & Anor v. PP [1991] 3 CLJ 2414; [1991] 1 CLJ (Rep) 428 SC ***(refd)***
C *Teoh Hoe Chye v. PP & Another Case [1987] 1 CLJ 471; [1987] CLJ (Rep) 386 SC* ***(refd)***
Ti Chuee Hiang v. PP [1995] 3 CLJ 1 FC ***(refd)***
Yeong Kia Heng v. PP [1992] 1 CLJ 364; [1992] 1 CLJ (Rep) 372 SC ***(refd)***

D **Legislation referred to:**
Criminal Procedure Code, s. 179(1)
Dangerous Drugs Act 1952, ss. 37A, 37(da), 39B(1)(a), (2)
Evidence Act 1950, s. 114(g)
Penal Code, s. 34

E *For the accused - Tuan Hj Hisyam Teh Poh Teik; M/s Teh Poh Teik & Co*
For the prosecution - Shahrizal Shaari DPP

Reported by Suhainah Wahiduddin

F **JUDGMENT**

Mohd Zawawi Salleh JC:

Background

G **[1]** Ng Sing Ting and Chia Meng Leng ("the accused persons") were jointly charged with trafficking in 851.5 grams of monoacetylmorphines, an offence under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act') read together with s. 34 of the Penal Code and punishable under s. 39B(2) of the Act. H Both of the accused persons claimed trial to the charge.

The Charge

[2] The charge preferred against both of the accused persons reads as follows:

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Bahawa kamu bersama-sama pada 28 Jun 2002, lebih kurang jam 11.40 pagi, di tempat letak kereta, Kondominium Larkin Utama, Larkin, dalam daerah Johor Bahru dalam Negeri Johor Darul Ta'zim, telah mengedar dadah berbahaya iaitu 851.5 gram Monoacetylmorphines, dan dengan itu kamu telah melakukan satu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 dibaca bersama dengan seksyen 34 Kanun Keseksaan dan boleh dihukum di bawah seksyen 39B(2) Akta Dadah Berbahaya 1952.

The Case For The Prosecution

[3] The prosecution in presenting its case called a total of 10 witnesses including the chemist. The facts of the prosecution's case can be elicited from the main witnesses as follows:

The evidence of SP4 (ASP Leong Ah Kow)

3.1 Acting on information received, SP4 had on 28 June 2002, at about 8am, briefed his men with regard to a drug trafficking activity at condominium Larkin Utama. SP4 divided his men into 3 groups. SP4 led the first group whilst the second group was led by C/Insp. Bashar bin Safar (SP6) and the third group by Insp. Khalid bin Mat (SP7). SP4's group took position in a vehicle at the entry point to the condominium whilst members of the second group were in a vehicle at the exit point of the condominium. The third group was directed to make observation in and around the condominium.

3.2 The police party led by SP4 arrived at the scene at about 9am. At about 11.40am, SP4 received information from SP7 through his walkie-talkie that 2 male Chinese, who were probable targets, were leaving the area in a Proton Wira and a Kelisa. SP4 then directed that they be arrested. SP4 and his men sprung into action. When SP4 arrived at the exit access out of the condominium, he saw 3 vehicles in front of him.

3.3 These vehicles were a Proton Wira, a Kelisa and Inspector Bashar's (SP6) vehicle. SP6's vehicle was blocking the exit of both the Kelisa and the Proton Wira. SP4's group arrested the driver of the Proton Wira, who was later identified as the 2nd accused, whilst SP6's men arrested the driver of the Kelisa, later identified as the 1st accused.

3.4 SP4 said he administered a caution under s. 37A of the Act on the 2nd accused and then he did a search in respect of the Proton Wira.

3.5 The 2nd accused was then brought to his condominium unit where a search was conducted. SP4 said he instructed SP7 to do the search and SP4 was present as well. The 2nd accused was guarded by both L/Kpl Badri and Kpl Zainal Hassan. It was SP4's evidence that while SP7 was conducting the search, SP7 informed him (SP4) that he saw the 2nd accused and a male Chinese were transferring something from one car to the other SP4 said SP7 informed him that the accused persons were doing something in the boot of a Proton Wira bearing No. JGN 9430. Nothing incriminating was found in the said condominium.

3.6 At about 12.40pm, SP4 said he took over custody of the 2nd accused from SP7. SP4 then brought the 2nd accused to the Proton Wira JGN 9430 which was parked in the car park of the condominium. When SP4 reached the car park, he directed SP6 to bring the 1st accused to JGN 9430. SP4 was informed by SP6 that a set of car keys and the remote control to JGN 9430 were recovered from the 1st accused.

3.7 Using the remote control, SP4 was able to unlock car JGN 9430. A search was made in JGN 9430. When the boot to JGN 9430 was opened, SP4 found the following:

(a) 1 blue canvas bag ("Casorama");

(b) 1 blue canvas bag ("8199"); and

(c) A briefcase ("Alberlight")

3.8 These bags were then examined:

(a) The Casorama bag

3.8.1 The Casorama bag was zipped but not locked. When it was unzipped, SP4 found in it were 2 black plastic bags. SP4 examined the slightly bigger black plastic bag and found in it were 10 newspaper packages each containing a transparent plastic packet which had in it yellowish granular/powdering substances suspected

to be heroin. The smaller black plastic bag was then examined and found to have 5 plastic packages of substances suspected to be drugs.

(b) The bag 8199

3.8.2 In bag 8199 was a transparent plastic bag with 8 newspaper packages each wrapping a plastic packet containing substances suspected to be drugs.

(c) The Alberlight briefcase

The contents of the briefcase have no connection with this case.

3.9 In the JGN 9430, SP4 also found the service book of JGN 9430 and in the service book was the registration book of JGN 9430 in the name of the 2nd accused.

3.10 The exhibits together with both the 1st and 2nd accused were then brought to the Police Station where SP4 marked the various exhibits seized and then handed them over to the investigating officer, C/Insp Chew Chee Lee (SP9).

The evidence of Insp. Bashar bin Safar (SP6)

3.11 In essence, SP6 confirmed that he arrested the 1st accused who was driving the Kelisa and from the pocket of the 1st accused, SP6 recovered a set of 2 car keys and a remote control which was subsequently used by SP4 to unlock JGN 9430.

The evidence of Insp Khalid bin Mat (SP7) and Det. Kpl Rahizam (SP8)

3.12 Both SP7 and SP8 arrived at the scene at about 9am and kept observation at the car park from the toilet in the condominium. The vehicles JGN 9430 and the Kelisa were already parked there. Later, at about 11am, he saw two male Chinese, later identified as both the 1st and 2nd accused going into Kelisa and the JGN 9430 respectively and shifted the positions of both the vehicles and then left the area. At about 11.20am, both the accused persons returned to JGN 9430. SP7 saw the 2nd accused opened the boot to JGN 9430 and bent his

A body into the boot whilst the 1st accused stood beside the boot and looked left and right. Later SP7 closed the boot and the 1st accused then went towards the Kelisa whilst the 2nd accused went towards another vehicle JET 9981 and thereafter both the vehicles left the B car park. The Kelisa left first followed by JET 9981. SP7 then informed SP4 of what he saw.

3.13 The evidence of SP8 substantially corroborated that of SP7. However, SP8 went on to say he was not only able C to see the 2nd accused bent his body into the boot of JGN 9430 but saw the hand movements of the 2nd accused from left to right as though shifting something. SP8 said he climbed on the toilet bowl and saw the 2nd accused held a newspaper package in his hands and D moved them from left to right. SP8 was unable to say whether there was any container, boxes or bags in the boot.

The Evidence of the Investigating Officer – C/Insp Chew Chee Lee (SP9)

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3.14 Apart from the formal aspects of his evidence, SP9 in his cross-examination states as follows:

(a) that Chong Mei Fong who was the girlfriend of the F 2nd accused and who was arrested at the 2nd accused's condominium by SP7 (Insp Khalid) was not handed over to him;

(b) that Teo Yeow Seng who was arrested and charged together with both the accused persons was released G about a year later;

(c) that Teo Yeow Seng was arrested and charged together with both the accused persons because one set of the car keys and remote control to JGN 9430 H was found in a Mercedes car belonging to Teo Yeow Seng;

(d) that he cannot deny that Teo Yeow Seng had access to JGN 9430; and

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(e) that one set of keys to JGN 9430 was given to him by SP4 (ASP Leong Ah Kow) and another set of keys and remote control to JGN 9430 was given to him by C/Insp. Ahmad Radzi. In re-examination SP9 confirmed that the set of keys handed over to him by C/Insp Ahmad could unlock JGN 9430. SP9 further confirmed that Teo Yeow Seng was arrested on 28 June 2002 at about 12.15pm at DNP Plaza.

Maximum Evaluation

[4] The judgment of Gopal Sri Ram JCA delivered for the Court of Appeal in *Looi Kow Chai & Anor v. PP* [2003] 1 CLJ 734 clarified that the duty of a judge sitting alone is to determine at the close of the prosecution's case as a trier of fact whether the prosecution has made out a *prima facie* case and that he must subject the prosecution evidence to maximum evaluation. This test was affirmed by the Federal Court in a judgment delivered by the same learned judge in *PP v. Mohd Radzi Abu Bakar* [2006] 1 CLJ 457. (See also *Balachandran v. PP* [2005] 1 CLJ 85 at pp 99 and 100 per Augustine Paul JCA (now FCJ) delivering the judgment for the Federal Court.).

[5] Based on the above I find that the prosecution had failed to prove a *prima facie* case for the following reasons:

(a) that there are serious doubts as regards the identity of the drug exhibits;

(b) that in respect of the 1st accused, Ng Sing Ting, the element of possession has not been proven against him;

(c) that in respect of the 2nd accused, Chia Meng Leng, he was not in exclusive possession of the drugs in JGN 9430 due to the Teo Yeow Seng and Chong Mei Fong factors; and

(d) the credibility of both SP4 and SP8.

[6] These issues are now separately discussed.

(a) There are serious doubts as to the identities of the drugs exhibit

6.1 This issue is common to both the accused persons. The doubts arise because there is a discrepancy as to the weight of the drugs in question.

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6.2 The I.O (SP9), said the gross weights of the drugs are as follows:

(i)	weight of the 5 packets in the Casorama bag	– 2335 grams
(ii)	weight of the 10 packets in the Casorama bag	– 4673 grams
(iii)	weight of the 8 packets in the bag No. 81996	– 3770 grams
	Total	10778 grams

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6.3 However, in cross-examination, the I.O agreed that in the report lodged by SP4 *vide* Larkin Report No. 2390-1/2002 the weight stated was 10.58 kilograms. In term of grams it would be 10580 grams.

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6.4 Considering the 2 weights there is a discrepancy or difference of 198 grams. This difference is a substantial amount, it represents about 14 times the statutory limit for trafficking. There is no explanation as to how the discrepancy came about. It is clear that from the time the drug passed from the hands of the arresting officer (SP4) to the I.O (SP9) the weight has increased by 198 grams to the detriment of the accused. On this score alone it cannot be said that a *prima facie* case has been proven. (See: *Yeong Kia Heng v. PP* [1992] 1 CLJ 364; [1992] 1 CLJ (Rep) 372, *PP v. Lee Hock Lai* [2004] 1 CLJ 57 and *Lee Chee Meng v. PP* [1992] 1 CLJ 345; [1992] 1 CLJ (Rep) 168).

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6.5 In view of the material discrepancy of 198 grams, the mere assertion by SP4 (ASP Leong Ah Kow) that the drugs exhibits were in his custody and/or care is not sufficient.

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6.6 SP4, under the circumstances, must go one step further and explain what he did with the exhibits from the time they were seized to the time they were handed over to the I.O (SP9). The exhibits were seized at about 11.40am and were handed over to the I.O at 11.15pm. The following questions may be asked:

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(i) Where were the drugs exhibits kept?;

(ii) Were they kept under lock and key for about 12 hours?; and

(iii) Was there any opportunities of others having access to these exhibits and thereby tampering them?

(See: *Shamsuddin Hassan & Anor v. PP* [1991] 3 CLJ 2414; [1991] 1 CLJ (Rep) 428, *Pavone v. PP* [1986] 1 MLJ 423; *Teoh Hoe Chye v. PP* [1987] 1 CLJ 471; [1987] CLJ (Rep) 386).

(b) That there is no case against the 1st accused, Ng Sing Ting

6.7 There is absolutely no case against the 1st accused, Ng Sing Ting. The only evidence against him can be summarised as follows:

(i) that a set of the keys and remote control to JGN 9430 was found in his pocket by SP6; and

(ii) that he was together with the 2nd accused at the boot of JGN 9430 as though looking to the left and right.

(1) The keys and remote control to JGN 9430

6.7.1 It must be appreciated that JGN 9430 does not belong to the 1st accused. There is no evidence that prior to his arrest the 1st accused had driven the car, ever opened any of the doors to JGN 9430 or put the drugs inside the boot of JGN 9430.

6.7.2 As regards the keys to JGN 9430, the 1st accused had explained in his cautioned statement (exh. D109) as to how the keys came to his possession. He explained that the keys had been accidentally left by the 2nd accused when the latter came into his car (Kelisa) to discuss the gambling debts. The 1st accused then took the keys and put into his pocket with the intention to return to the 2nd accused.

6.7.3 Although the exculpatory self-serving statement cannot form the sole basis of an order of acquittal, the statement can still be considered and looked into by the trial court in its determination whether a *prima facie* case has been made out (see: *Balachandran v. PP* [2005] 1 CLJ 85 and *PP v. Lin Lian Chen* [1992] 4 CLJ 2086; [1992] 1 CLJ (Rep) 285).

6.7.4 Further as confirmed by SP9, Teo Yeow Seng too had possession of one set of keys to JGN 9430. That was why he was arrested and a set of keys and the remote control were found in the Mercedes of Teo Yeow Seng. As such it cannot be said that the 1st accused had possession of the JGN 9430 and consequently had possession of the drugs found in the boot to JGN 9430.

(2) The conduct of the 1st accused.

6.8 There is no physical nexus between the drugs in the boot of JGN 9430 and the 1st accused. He was merely near the boot and beside the 2nd accused looking left and right. The very most is that his behaviour would raise suspicion but suspicion is insufficient to impute knowledge, let alone physical custody or control. We cannot, under these circumstances, infer that the 1st accused had knowledge of the drugs in the boot of JGN 9430. His conduct is consistent with innocence.

(c) That the 2nd accused had no exclusive possession in respect of the drugs found in the boot of JGN 9430.

6.9 Although the 2nd accused is the registered owner of JGN 9430, on the evidence as adduced by the prosecution, it cannot be said that the prosecution had proved the element of possession against him to trigger the trafficking presumption under s. 37(da) of the DDA 1952 for the following reasons:

(1) The Teo Yeow Seng factor

6.9.1 Teo Yeow Seng is not a fictitious character. The I.O confirmed that C/Insp Ahmad Radzi arrested Teo Yeow Seng at Plaza DNP Johor Bahru. As can be seen from exh. D103 (Committal Proceedings Record) Teo Yeow

Seng was charged together with both the accused for the same offence. According to the I.O, the charge against Teo Yeow Seng was withdrawn after one year.

6.9.2 As regards Teo Yeow Seng, the I.O further confirmed the following:

(i) that Teo Yeow Seng was charged together with both the accused persons because a set of keys and remote control to JGN 9430 was found in the Mercedes belonging to Teo Yeow Seng;

(ii) that apart from SP4 (C/Insp Leong Ah Kow) C/Insp Ahmad Radzi (who arrested Teo Yeow Seng) also handed to him (the I.O) a set of key and remote control to JGN 9430 which could unlock JGN 9430;

(iii) that the I.O cannot deny that Teo Yeow Seng could have access to JGN 9430.

6.9.3 By reason of the aforesaid it cannot be said that the 2nd accused alone had exclusive possession of the car and consequently exclusive possession of the drugs in the boot of JGN 9430.

(2) The Chong Mei Fong factor

6.9.4 Chong Mei Fong is also real person and was in fact arrested by Insp Khalid (SP7). Chong Mei Fong was not handed over to the I.O. The I.O conceded that Chong Mei Fong was the girlfriend of the 2nd accused. It cannot be denied that Chong Mei Fong was arrested in the 2nd accused's condominium. Further the I.O also cannot deny that Chong Mei Fong could have access to JGN 9430 in that she could drive JGN 9430 whenever she wished.

(3) Non-production of both Teo Yeow Seng and Chong Mei Fong.

6.9.5 It cannot be disputed that both Teow Yeow Seng and Chong Mei Fong are material witnesses. Both were not called by the prosecution nor were they offered to the defence for purpose of cross-examination.

6.9.6 This is fatal. The failure by the prosecution to call them carry the following consequences:

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(i) there is breach in the rule in *Ti Chuee Hiang v. PP* [1995] 3 CLJ 1;

(ii) there is a gap in the case of the prosecution, in that both Teo Yeow Seng and Chong Mei Fong have not
B been excluded from having access to the JGN 9430;

(iii) that s. 114(g) of the Evidence Act 1950 can be invoked against the prosecution as there is no explanation why no attempts at all were made to locate both Teo Yeow Seng and Chong Mei Fong; and
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(iv) the defence cannot be penalised if the police failed to locate Teo Yeow Seng and Chong Mei Fong and as such the 2nd accused must be given the full benefit of the doubt:
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(See: *Pang Chee Meng v. PP* [1992] 1 CLJ 39; [1992] 1 CLJ (Rep) 265).

(4) The 2nd accused is entitled to the benefit of the
E doubt.

6.9.7 Because Teo Yeow Seng and Chong Mei Fong were not called the following inferences can be drawn:

(i) that Teo Yeow Seng had exclusive possession of the
F drugs in JGN 9430;

(ii) that Chong Mei Fong had exclusive possession of the drugs in JGN 9430; or

(iii) that the 2nd accused had exclusive possession of the
G drugs in JGN 9430; or

(iv) any two of the above named persons jointly have exclusive possession of the drugs in JGN 9430.

H 6.9.8 The above reasoning is similar in approach to that taken in *R v. Abbot* cited with approval in the Malaysian Courts including *Shamsuddin Hassan & Anor v. PP* [1991] 3 CLJ 2414; [1991] 1 CLJ (Rep) 428.

(d) The credibility of SP4 (ASP Leong Ah Kow).
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[7] The court finds that SP4 is not a credible witness. The following contradictions will show that SP4 is not credible:

Contradiction No. 1

7.1 In examination in chief, SP4 said Insp Khalid (SP7) informed him that he (Insp Khalid) saw the 2nd accused "membuat pemindahan suatu benda tersebut".

In cross-examination, on this aspect, SP4 then clarified at p. 16 of the notes that "… Itu satu kesilapan keterangan".

Contradiction No. 2

7.2 SP4 said he was never involved with regard to the arrest of Teo Yeow Seng and he did not know that Teo Yeow Seng was charged together with both the accused persons. However, his evidence on the above aspect was flatly contradicted by exh. D103 (the Committal Proceedings Record) where it showed that SP4 was indeed the complainant in respect of the charge against Teo Yeow Seng and the two accused persons.

Contradiction No. 3

7.3 SP4 said that he handed both the accused persons to the I.O (SP9) at 11pm on 28 June 2002. However, in JB High Court Criminal Trial No: 45-33-2003 (*PP v. Chia Meng Leng*, SP4 said he handed the 2nd accused to the I.O of that case, one Insp Arman at 8pm on 28 June 2002 (see exh. D104).

Contradiction No. 4

7.4 This relates to the other drugs case recovered from car JET 9981 where at p 16 of the notes SP4 said:

> Terdapat rampasan dadah yang lain di tempat kejadian. Rampasan dadah ini juga sentiasa berada di bawah jagaan saya. Sekarang saya mengatakan bahawa keterangan saya terdahulu yang mengatakan rampasan dadah lain di tempat kejadian dibawa oleh Inspektor Basha bersama OKT1 adalah tidak betul.

A **Contradiction No. 5**

7.5 Contradiction No. 5 relates to the issue whether SP4 himself went up to the 2nd accused's condominium when Insp Khalid did a search. In Johor Bahru High Court case
B No: 45-33-2003, SP4 said he did not go up whilst before this court SP4 said he went up. The contradiction is material and the court allowed the defence to impeach him on this aspect.

C 7.6 SP4 explained the contradiction on the basis he gave detailed evidence in case No: 45-33-2003 and that the incident took place in 2002 and therefore his memory faltered. He said he gave that kind of evidence in High Court No. 2 as he thought that part of the evidence is
D not relevant and that he could rectify his evidence in re-examination. He also said that he was involved in many cases.

7.7 The court cannot accept the explanation as reasonable. SP4 is a very senior officer. He holds the rank of an ASP.
E There is no excuse if he had been involved in many cases. He is expected to be so. All police witnesses including SP4 would have given their 112 statements and there is nothing to prevent SP4 from refreshing his memory before trial. Therefore, the issue of "ingatan saya terhad" cannot arise.
F The issue of giving detailed evidence is also of no excuse. SP4 is expected to give detailed evidence when asked by the learned DPP. It is for the court to rule on the issue of relevancy. SP4's duty is to truthfully narrate the facts.

G 7.8 I therefore impeached SP4 as the alleged explanation by SP4 is absolutely incredible. In the alternative, even SP4 is not impeached, SP4 can no longer be considered a credible witness based on the many contradictions highlighted. (See: *Matthew Lim v. Game Warden, Pahang*
H [1959] 1 LNS 57, *Kong Chooi v. R* [1955] MLJ 209, and *PP v. Munusamy* [1980] 1 LNS 63).

The Credibility Of SP8

7.9 SP8 testified that by standing on the toilet bowl in the
I toilet he could see the 2nd accused bent his boot of JGN 9430 and held a newspaper package in his hands moving from left to right. This aspect has been challenged by the

defence and this part of the evidence cannot inspire confidence and/or accepted as true. The reasons are as follows:

Reason No. 1

7.9.1 If indeed this was true it is a fairly crucial piece in the case for the prosecution. It defies both logic and common sense that this important piece of evidence is kept in SP8's sleeves until he came to court on 26 September 2007. SP8 never informed SP4 nor informed SP7 (Insp. Khalid) about this bearing in mind that it was SP4 who asked him to observe and SP8 was observing together with SP7.

7.9.2 SP8 must report what he observed. There is also no evidence that SP4 had informed the I.O about this. SP8 conceded in cross-examination that aspect was important. Revealing it for the first time in court is suspicious and the court ought to treat his evidence on this aspect with caution (see *Kesavan Petchayo v. PP* [2003] 1 CLJ 846).

Reason No. 2

7.9.3 Reference is made to the opening address (P3). There is no mention of this important aspect in the opening address. All it says in the opening address on this aspect is:

> ... tertuduh kedua telah dilihat menghadap ke arah boot kereta tersebut dalam keadaan boot kereta terbuka ...

7.9.4 There is no mention of the second accused holding a newspaper package in his hands moving from left to right. This important aspect must be disclosed as s. 179(1) of the CPC which states:

> The officer conducting the prosecution shall open his case by stating shortly the nature of the offence charged and the evidence by which he proposes to prove the guilt of the accused.

A

7.9.5 Although a trial judge is not bound by the prosecution's formulation of its case (opening address), the failure on the part of the prosecution to mention this important aspect of evidence is clearly an after thought and embellishment.

B

Reason No. 3

7.9.6 SP8's evidence on this aspect does not inspire confidence bearing in mind the following factors:

C

(i) that the boot of JGN 9430 was not directly in front of him;

(ii) that JGN 9430 was parked at an angle and the visibility, was clearly blocked by the horizontal pillar and the plants;

D

(iii) that there is no evidence that the boot of JGN 9430 was lighted when opened so as to assist in visibility;

E

(iv) that it is doubtful that SP8 could see the newspaper package when he could not see any bags or boxes or containers in the car; and

(v) that there is no adequate investigation on this aspect to enable the court to rely on the evidence of SP8, for example, for the I.O and to come and explain that he had investigated on this aspect and that standing on the toilet bowl would enable one to see the inside of the boot of the vehicle similarly parked as JGN 9430. There was no closed up photographs of the toilet together with the proper drawings in the sketch plan to show where JGN 9430 was parked when SP8 made the observation etc to assist the court to come to a proper finding. SP8 also made no reference to the sketch plan to properly explain his position in relation to JGN 9430 bearing in mind JGN 9430 was parked at an angle.

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Conclusion

[8] Based on the aforesaid, that court held that prosecution has not made out a *prima facie* case against both the accused persons and consequently the court acquit and discharge both the accused persons without their defence being called.